Supreme Court, U.S.
FILED
JUN 26 1996
CLERK

No. 95-1848

In The

Supreme Court of the United States

October Term, 1995

ADRIENNE DOWLING,

Petitioner,

vs.

ATLANTA CITY SCHOOL DISTRICT; JOSEPH G. MARTIN, JR., President, PRESTON W. WILLIAMS, Vice President, MIDGE SWEET, D. F. GLOVER, JOHN F. ELGER, ROBERT WAYMER, MARY ANNE BELLINGER, INA EVANS, and CAROLYN YANCEY, Members, In Their Personal and Official Capacity; LESTER W. BUTTS, Superintendent, In His Personal and Official Capacity; and MYRTICE TAYLOR, Associate Superintendent for Instruction, In Her Personal and Official Capacities,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

PATRICK W. MCKEE
R. MASON BARGE
Attorneys for Petitioner

MCKEE & BARGE
The Candler Building, Suite 400
127 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 577-8300 (Office)
(404) 577-4902 (Telecopier)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

12 pp

TABLE OF CONTENTS

Page

A. Mistatements of Record Evidence 1

B. The 11th Circuit Has Not Ruled on the Issue Here Presented 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Atlanta Bd. of Ed. v. Dowling, Civil Action No. E-16735.5 (Superior Court of Fulton County, January 15, 1994) 5

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 8

McDaniels v. Flick, 59 F.3d 446 (CA3 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1017 (1996) 8

McKinney v. Pate, 20 F.3d 1550 (CA11 1994) 8, 9

Scheurer v. Rhodes, 416 U.S. 232 (1974) 7

Stewart v. Bailey, 556 F.2d 281 (CA5 1977) 4, 5

Zinermon v. Burch, 494 U.S. 113 (1990) 6

STATUTES

42 U.S.C. § 1983 .....1, 2, 3, 10

O.C.G.A. § 20-2-940 6

O.C.G.A. § 20-2-1160 .....6, 8

U.S. Const. Amend. XIV 4, 5, 6, 10

A. Misstatements of Record Evidence.

The facts stated in Dowling's Petition are correct; the contrary facts stated in the Brief in Opposition are demonstrably false and, at several critical points, simply fabricated. It is inconceivable that the Respondents have made so many direct factual misrepresentations to the United States Supreme Court, with an intention to deceive it. In fairness, the Respondents have retained new counsel for this Petition, and one must ascribe these errors to a hurried review of an unfamiliar record.

No matter how innocent it might be, however, the Brief in Opposition repeatedly and grossly misrepresents relevant facts in the record. Dowling asks that the Court's consideration of her Petition not be influenced by a Brief so entirely inaccurate. The Brief in Opposition admits, as it must, the confusion among the states and circuits on the issues presented, although it denies the degree of the split in authority. Moreover, the parties' positions in this case lie precisely on the two sides where authority is split: whether a deprivation of due process, accomplished by a state agency responsible for providing it, will state a cause of action under § 1983.

The Brief in Opposition does not even comprehend the holding below. At page 11, the Respondents cite "procedural facts which authorized the trial court to make a determination, as a matter of law that Petitioner had not been deprived of a protected property interest without due process of law". In the first place, the Respondents simply fabricate the "facts" supporting this contention. In the second place, the holding of the courts below was just the opposite. The holding of the Georgia

Supreme Court below was that it would not allow a § 1983 suit to remedy a violation of due process, no matter how serious, because the state remedy was "adequate" to remedy it – *not* because no violation had occurred. It did not disturb the findings of the courts below that "the record clearly shows a procedural due process violation in this case." (Petition, A11.)

In the limited space below, Dowling briefly cite the most egregious fabrications of fact in the Brief in Opposition, and give a citation (and a quote, if appropriate) to the actual record.

1. The Respondents assert that "Petitioner was out of her office without pay only from . . . July 15, 1992 until . . . August 20, 1992." (Brief in Opposition, p. 8)

This assertion is incomprehensible. Dowling was fired effective July 1, 1992, and was not allowed in her office until January, 1994. (Petition, A7.) During this time, her salary was discontinued from July 15 to August 20, 1992, (Petition, A15; R1 176)[1]; from November 9, 1992 (Petition, A7; R1 293 (¶¶ 2 and 3)), until March 16, 1993

---

[1] For reasons known only to themselves, the Respondents have adopted a confusingly different record citation form from that used in the Petition. Since the facts are in dispute, Petitioner will use the Respondents' system for purposes of this Reply. Citations to the first appeal, Ga. Supreme Court case No. S93A1330 (upholding the sanctions award against the School Board), will be designated "R1". Citations to the record of Ga. Supreme Court Case No. S95C1083 (the present appeal) will be designated "R".

(In the original Petition, citations to S93A1330 are designated "R I", and citations to S95C1083 are designated "R II".)

(R1 297; see Petition, A4); and from April 7, 1993, until January, 1994 (R 277). During the 18-month period, she was deprived of pay for periods of over one month, four months, and nine months.

2. At page 4 of their Brief, Respondents claim that they "fully complied with [the court's August 20] order. In fact, they transgressed this order so badly that they were fined for contempt of court. (R1 292.)

3. At page 9, the Respondents also assert that no "other alleged violations of due process were raised in Petitioner's complaint or preserved for review by this Court," than "pre-termination procedural due process." This is, again, simply incomprehensible.

In her complaint, Dowling specifically pleaded that "The Schools' suspension and dismissal of Dowling without providing . . . a timely post-termination hearing . . . violate 42 U.S.C.A. §§ 1983 and the fourteenth amendment . . . . " (R1 168, 181 (¶ 44)).

She raised and argued this issue at length in all appeals, including the instant Petition. (E.g., Brief of Appellant, Case A94A2185, p. 17; Brief of Respondent, S95C1083, page 9; Petition, p. i, (1) and (2) and *passim*.)

4. The Respondents claim that Dowling "received all the pre-termination process that was due". (Brief in Opposition, p. 12.) This is simply mind-boggling. They ignore the most basic premise of due process, that is, their duty to comply with the hearing's outcome. A hearing which establishes a lack of justification to discipline

an employee, which is then ignored by the state, is not "due process" at all.[2]

The fundamental principle of due process consists of the state's duty to provide, not simply a hearing, but a "meaningful" hearing. *E.g., Stewart v. Bailey*, 556 F.2d 281, 285 (CA5 1977) (a tenured employee "must be accorded a meaningful opportunity to be heard in his own defense"). To ignore the result of a hearing renders the concept of due process meaningless, a sham form preliminary to a preordained termination, which is exactly what happened here.

5. At page 8 of their Brief, the Respondents assert that

> Petitioner had a full hearing on October 4, 5, and 8, 1992 and has never challenged the adequacy – either under the Fair Dismissal Act or under the 14th amendment – of that hearing.

This statement is, again, simply incomprehensible. Dowling specifically complained that the notice of the charges against her was so inadequate as to violate the Fourteenth Amendment in her complaint (R1 168, 181), at her administrative hearings (see R 147-155), in her administrative appeal (R 188-198, ¶¶ 3, 4, 9, 11, 13), in her Proposed Pretrial Order (R 313, 320), to the Georgia Court of Appeals (Brief of Appellant, A94A2185, page 18), and the Georgia Supreme Court (Brief of Respondent, S93C1083, pages 23-24).

---

[2] Respondents' argument recalls a scene from the movie "Hang 'em High", in which the sheriff stops a posse from lynching Clint Eastwood. "You can't hang him," says the sheriff, "he's got a right to a fair trial". "Fine", says one of the posse. "We'll give him a trial. *Then* we'll hang him."

6. At page 7, n. 13, the Respondents assert that "there is no support for Petitioner's assertion that the hearing was 'constitutionally inadequate.' "

There is not simply "support" for the proposition; it is arguably established as a final finding in this case. In reviewing the adequacy of the hearing under the Fair Dismissal Act, the State Board of Education held that:

> None of these charges[3] [i.e., the notice of charges served on Dowling] carries with it the specificity needed to permit Appellant to show any error that may exist therein. While Appellant was able to provide a defense . . . [d]efending against such charges is mere guesswork on Appellant's part.

(R 229.) The superior court affirmed this decision[4], and the Respondents took no further appeal. Thus, the State Board's findings are final and binding.[5]

---

[3] Typical of the Respondents' bad faith, the Respondents repeatedly changed and supplemented the charges against Dowling. Most of these were invented and sent to her *after* her first termination, and after the initial hearing was scheduled. (R1 204, 208, 210, 212, 215, 220.) Please note that the charges held inadequate by the State Board were served on Dowling *after* the hearing officer continued the hearing, a second time, on September 17 for failure of adequate notification. In other words, these charges were the ones served by the School Board to *remedy* an initial finding of inadequate notice.

[4] *Atlanta Bd. of Ed. v. Dowling*, Civil Action No. E-16735.5 (Superior Court of Fulton County, January 15, 1994).

[5] While its decision was based on the Fair Dismissal Act, the test for adequacy of notice is identical under the Fair Dismissal Act and the Fourteenth Amendment. The language of the Act is, in fact, adopted from a Fourteenth Amendment case, *Stewart v. Bailey*, 556 F.2d 281, 285 (CA5 1977). Thus, while the

7. At page 15 of their Brief, the Respondents, attempting to distinguish *Zinermon v. Burch*, 494 U.S. 113 (1990), state that the "Georgia law at issue in this case require procedures which provide no discretion to the governmental agency . . . . " To confuse a failure by the State to provide an adequate due process statute, the Respondents blur the lines between Dowling's statutory rights to due process under Georgia law and her purely contractual rights, which the administrative process refused to enforce.

The only due process guarantee available to Dowling under Georgia statutes, O.C.G.A. § 20-2-1160, explicitly gives discretion to a local board of education to formulate procedures. The State Board decision illustrates the point. It held that the notice given to Dowling was inadequate to permit a defense under the Fair Dismissal Act (O.C.G.A. § 20-2-940), but that it was powerless to remedy the inadequacy, because the Act did not apply to Dowling. (R 229-30, 232.)

8. At page 4, Respondents assert that the lower court granted Dowling summary judgment "under the Fair Dismissal Act." The court, however, found that Dowling had no protection under the Fair Dismissal Act "as a matter of statutory construction" and cited a Fourteenth Amendment case as the grounds of summary judgment.

---

holding is not res judicata, the Board's factual finding of inadequacy, upheld on appeal, collaterally estops the Board from asserting that the notice was adequate under the Fourteenth Amendment.

(Petition, A16.)[6] Dowling did not have any statutory rights under the Act.

9. The entire second paragraph of the Respondents' Statement of Facts (Brief in Opposition, pp. 1-2) is completely unsupported by record evidence; the point which the Respondents attempt to make, based on these "facts", is a gross falsehood. The paragraph's record citation is to a self-serving letter written by Respondents' counsel, who did not even attend this "hearing"; the second half of the paragraph contains no record citation at all, because none exists. In fact, the discussion at these meetings did not even begin to encompass the grounds upon which the School Board attempted to justify Dowling's termination.[7]

Dowling did not get a pre-termination hearing. There is sworn testimony in the record that Dowling received no "pre-termination hearing". (R1 59, 177 (¶24).) The Respondents even admitted that "the Atlanta Board of Education did not schedule a hearing with respect to the

---

[6] The court did turn to the language of the Fair Dismissal Act to determine the procedures to afford. The reason for this is that Dowling's *contract* incorporated portions of the Act, but only by reference, that is, as a contractual provision. Her contract might as easily have referenced the procedures of the Tibetan Fair Dismissal Act. The point is, Georgia's statutes afforded her no specific rights at all.

[7] At page 10, the Respondents have the brass to call these fabricated facts "undisputed" by vague references to a "number of hearings", etc. As shown, the facts are at best disputed and must be construed in Dowling's favor. The reference to an unidentified "motion for summary judgment" hardly changes this presumption. *Scheurer v. Rhodes*, 416 U.S. 232, 236 (1974).

proposed non-renewal of Plaintiff's employment contract prior to June 16, 1992." (R 9, ¶20.)

At various points (e.g., Brief in Opposition, pp. 1-2, 7) the Respondents attempt to mislead the Court by characterizing these hearings as issues decided in their favor by the court below. While the superior court did mentioned both the 1991 "hearing" (R1 65) and the July 15, 1992 "hearing", it did so only in the context of finding that these hearings were inadequate to constitute a pre-termination hearing under the Fair Dismissal Act[8] (R1 65 (¶ g)). Its holding was contrary to the School District and meant to support its restraining order against them. This hardly constitutes evidence that these "hearings" were a "pre-termination" hearing adequate under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

B. The 11th Circuit Has Not Ruled on the Issue Here Presented.

The Brief of Respondents chides Dowling's Petition for its failure to "argue that the instant case can be distinguished in any way" from *McKinney v. Pate*, 20 F.3d 1550 (CA11 1994), or *McDaniels v. Flick*, 59 F.3d 446 (CA3 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1017 (1996). The holdings of *McKinney* and *McDaniels* can be summed up in a sentence:

---

[8] This holding was made under Dowling's contract; as a matter of statutory law, the only rights Dowling enjoyed to due process under state law (O.C.G.A. § 20-2-1160) were so open-ended as to deny her constitutional protection. (R 229-30.)

> [A] discharged employee cannot claim in federal court that he has been denied due process . . . where he has not taken advantage of his right to a post-deprivation hearing . . . that can rectify any possible wrong committed by the initial decision maker.

59 F.3d at 460. The holding in *McKinney* was identical; the state actor voluntarily gave him a hearing and allowed for an appeal. 20 F.3d at 1555. Dowling's argument is just the opposite: she could not "take advantage of her right to a post-deprivation hearing". She *had* to go to court for constitutionally-adequate relief on three different occasions. Furthermore, the administrative process available to Dowling could not "rectify" procedural defects. The State Board specifically held as such. (R 229-232.)

The Respondents also argue, tacitly, that an employee who files suit in state court, and wins, has gotten relief from "the state". (Brief in Opposition, pp. 15-16.) A state, however, may be sued as a party in a "state court"; the two entities are not the same. In performing its judicial function – that is, by compelling a state actor to provide due process – a state court of general jurisdiction stands in the shoes of a federal court, not the shoes of the entity which fired her. If a state agency's abuse of delegated power requires an employee to file a lawsuit in order to get due process, the fact that she does so in state court does not mean that the "state" has provided due process. Such a holding would result in the states' courts applying

different substantive legal standards for interpreting the Fourteenth Amendment than the federal courts.[9]

CONCLUSION

Dowling prays the Court not to allow the Respondents' wholesale factual misrepresentations to deter it from accepting the Petition. The case presents clear examples of egregious due process abuse and constitutes an appropriate vehicle for this Court's consideration of an important and divisive issue of Constitutional law.

Respectfully submitted,
PATRICK W. MCKEE
R. Mason Barge
Attorney for Petitioner
Adrienne Dowling

MCKEE & BARGE
Suite 400, The Candler Building
127 Peachtree Street, N.E.
Atlanta, GA 30303
(404) 577-8300 (Office)
(404) 577-4902 (Telecopier)

[9] A state court may also act as an appeal forum for an administrative process; in this function, it does indeed differ from a federal court. The court below did eventually exercise this function, but only *after* it forced the Schools to give Dowling a hearing in the first place. The whole point of this Petition is that Dowling had to sue under § 1983, invoking the court's plenary jurisdiction, to get a "meaningful" hearing in the first place.